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THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

ABDIQAFAR WAGAFE, *et al.*, on behalf  
of themselves and others similarly situated,

Plaintiffs,

v.

DONALD TRUMP, President of the  
United States, *et al.*,

Defendants.

No. 2:17-cv-00094-RAJ

**PLAINTIFFS' MOTION FOR COURT  
PERMISSION TO INTERVIEW  
LIMITED NUMBER OF PERSONS WHO  
SUSPECT THEY HAVE BEEN  
SUBJECTED TO CARRP**

**NOTE ON MOTION CALENDAR:  
January 24, 2020**

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1 **I. INTRODUCTION**

2 Plaintiffs move for an order permitting Plaintiffs' counsel to interview a limited number  
3 of persons (or their attorneys) who have communicated that they suspect their or their clients'  
4 immigration benefit applications are subject to the Controlled Application Review and  
5 Resolution Program ("CARRP") in response to the Public Notice to Potential Class Members  
6 (the "Notice") sent with Court approval in November 2019. This communication would permit  
7 Plaintiffs' counsel to further develop evidence for Plaintiffs' claims challenging the policy,  
8 including identifying the harms experienced by individuals with delayed immigration benefit  
9 applications. The proposed contact would be restricted to a pre-determined set of questions and,  
10 consistent with the Court's limited protective order (Dkt. 183), would not confirm or deny  
11 whether an individual's immigration application is subject to CARRP. Notably, these individuals  
12 already believe they are subject to CARRP as they (or their counsel) affirmatively contacted  
13 Class Counsel. The minimal risk of harm to any security interest is outweighed by the prejudicial  
14 effect on Plaintiffs' ability to build and present their case because of the inability to contact  
15 potential class members. Plaintiffs therefore request that the Court grant this motion and modify  
16 the protective order.

17 **II. BACKGROUND**

18 This lawsuit challenges CARRP, a policy created and used by U.S. Citizenship and  
19 Immigration Services ("USCIS"), and successor "extreme vetting" programs. *See generally* Dkt.  
20 47. Plaintiffs allege that CARRP implements an extra-statutory vetting policy, which  
21 discriminates based on religion or national origin, to indefinitely delay and pretextually deny  
22 statutorily-qualified immigration benefit applicants. *Id.* The Court has certified two nationwide  
23 classes: one made up of individuals who applied for adjustment of status (the "Adjustment  
24 Class"), and the second made up of individuals who applied for naturalization (the  
25 "Naturalization Class"). *See* Dkt. 69 at 31.  
26

1 Plaintiffs’ counsel’s access to Class Lists in order to identify unnamed class members  
2 who may possess relevant information pertaining to the Plaintiffs’ claims and ability to collect  
3 such information has been the subject of several disputes between the parties. *See, e.g.*, Dkts. 98,  
4 102, 148, 183, 274 (the Court’s various orders on these issues). The Court ultimately ordered  
5 Defendants to produce the Class Lists but also prohibited Plaintiffs’ counsel from confirming or  
6 denying whether any individual who contacts them might be subject to CARRP. *See generally*  
7 Dkt. 183. The Court’s limited protective order further required counsel to obtain authorization  
8 from the Court before communicating with any unnamed class members. *See id.* at 3. Plaintiffs  
9 have strictly adhered to this order. Declaration of Cristina Sepe in Support of Plaintiffs’ Motion  
10 (“Sepe Decl.”) ¶ 2. The protective order further requires that “Defendants agree to meet and  
11 confer with Plaintiffs’ counsel over ways in which Defendants might be able to provide  
12 Plaintiffs’ counsel with information about particular unnamed class members to develop  
13 evidence for use in their case.” Dkt. 183 at 3.

14 Following a separate dispute regarding notice to potential class members, the Court  
15 permitted Plaintiffs to post the Notice—containing only publicly available information. *See* Dkt.  
16 274 at 6–7. The purpose of the Notice was to solicit relevant details from potential class  
17 members in accordance with the limited protective order. In granting Plaintiffs’ motion to  
18 compel and denying Defendants’ cross-motion for a protective order on this issue, the Court  
19 observed that the Notice did not “disclose whether or not any particular individual was ever, or  
20 is, subject to CARRP.” *Id.* at 6. Plaintiff’s counsel publicly posted the Notice. Sepe Decl. ¶ 3;  
21 Exhibit A (Notice).

22 Several persons (directly or through their counsel) have responded to the Notice and  
23 reached out to Plaintiffs’ counsel communicating that they suspect that they are members of one  
24 of the classes. Sepe Decl. ¶ 6. On December 11, 2019, counsel for Plaintiffs met and conferred  
25 telephonically with counsel for Defendants, to seek a stipulation to allow follow-up interviews  
26 with six (6) of those who had responded to the Notice. *Id.* ¶ 7. In response to Defendants’

1 concerns, Plaintiffs’ counsel emphasized that they would not confirm or deny whether any  
2 individual’s application was subject to CARRP—the aim was simply to gather information about  
3 these individuals’ experiences in applying for immigration benefits to aid Plaintiffs’ prosecution  
4 of their claims, including identifying potential witnesses for trial. *Id.* ¶¶ 7–8. Plaintiffs’ counsel  
5 further pointed out that the individuals who responded to the Notice already suspect that they are  
6 subject to CARRP; otherwise, they would not have responded to the Notice in the first place. *Id.*  
7 ¶ 9. Plaintiffs also asked, in the absence of Defendants agreeing to modify the protective order,  
8 whether Defendants’ counsel would provide other information on respondents to the Notice like  
9 producing their A-files. *Id.* ¶ 10. Defendants rejected this alternative and did not otherwise  
10 propose “ways in which Defendants might be able to provide Plaintiffs’ counsel with  
11 information about particular unnamed class members to develop evidence for use in their case.”  
12 Dkt. 183 at 3.

13 During that same meet and confer, Defendants’ counsel asked for more information  
14 regarding the details of the proposed communication before presenting the request to the client  
15 agency. Sepe Decl. ¶11. Plaintiffs’ counsel emailed a proposal outlining the parameters of the  
16 contact with potential class members on December 13, 2019. *See id.* ¶¶ 11–12 & Exhibit B  
17 (12/13/2019 email). Counsel reiterated that they would not “confirm [the individuals] are class  
18 members even if asked or pressed,” but that the individuals (or their counsel) have reached out  
19 precisely because they already believe that they are subject to CARRP. *Id.*, Exhibit B. Plaintiffs’  
20 counsel further explained that they would limit their inquiry to the following topics:

- 21 1. Why they contacted us with respect to the notice.
- 22 2. Do they or their client have a pending application for  
immigration benefits, and if so what type of application.
- 23 3. When the application was filed; whether and when the  
applicant received a decision on the application; and if a  
24 decision was obtained, what the decision was and, if it was  
a denial, what basis was provided for the denial.
- 25 4. If the application was pending for longer than six months,  
what [were] they told (and when) for the delay in  
26 processing.

5. Were they ever informed whether or not the application was subjected to CARRP or a special vetting program.
6. If the application was pending for longer than six months, have there been personal or familial consequences associated with the delay in receiving a decision[.]
7. Would they be willing to provide us documents associated with their application and the adjudication of their application.
8. Would they be willing to be considered a potential witness in our litigation (where being a witness would result in the government being informed that they contacted us and were willing to testify about their situation).

*Id.* Counsel for Defendants responded on December 18, rejecting Plaintiffs’ proposal, maintaining that Plaintiffs would be “implicitly confirming that each individual’s immigration benefit application is being (or has been) subjected to the CARRP process” simply by establishing contact. *Id.*, Exhibit C (12/18/2019 email). Defendants’ counsel further contended that it is “unclear . . . how the testimony of any unnamed class members would be relevant” to the Plaintiffs’ claims. *Id.*

### III. LEGAL STANDARD

Rule 26 authorizes broad discovery “regarding any nonprivileged matter that is relevant to any party’s claim or defense . . .” Fed. R. Civ. P. 26(b)(1); *see Broyles v. Convergent Outsourcing, Inc.*, No. C16-775-RAJ, 2017 WL 2256773, at \*1 (W.D. Wash. May 23, 2017) (“Most importantly, the scope of discovery is broad.”). Generally, access to litigation documents and information produced during discovery is open unless the party opposing disclosure establishes “good cause” why a protective order is necessary. Fed. R. Civ. P. 26(c). The party seeking to vacate or modify the protective order must also demonstrate good cause. *See, e.g., Alexander v. FBI*, 186 F.R.D. 99, 100 (D.D.C.1998); *Beckman Industries, Inc. v. Int’l Ins. Co.*, 966 F.2d 470, 475 (9th Cir. 1992)). The decision to lift or modify a protective order is committed to the discretion of the district court. *Id.*

With respect to communications with potential class members, an order “limiting communications between parties and potential class members should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential

1 interference with the rights of the parties.” *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101 (1981).  
2 This weighing “should result in a carefully drawn order that limits speech as little as possible.”  
3 *Id.* at 102. Even a narrow order is only justified upon a “specific record” showing “the particular  
4 abuses” threatened by contact with the potential class members. *Id.*

#### 5 **IV. ARGUMENT**

6 In this case, the Court’s protective order regarding the Class List prevents Plaintiffs’  
7 counsel from “contacting the unnamed plaintiff members of the Naturalization Class and  
8 Adjustment-of-Status class for any purpose absent prior order of this Court.” Dkt. 183 at 3.  
9 Typically, however, class counsel can freely communicate with unnamed class members—their  
10 clients—to represent their interests and obtain information from them to help litigate their  
11 claims. *See, e.g., Baumann v. Chase Inv. Servs. Corp.*, 747 F.3d 1117, 1122–23 (9th Cir. 2014)  
12 (noting that “class counsel’s ability to fairly and adequately represent unnamed [class members]”  
13 is a “critical requirement[] in federal class actions”); *Domingo v. New England Fish Co.*, 727  
14 F.2d 1429, 1441 (9th Cir. 1984) (finding that “restrictions on [counsel’s] communications [with  
15 class members] created at least potential difficulties for them as they sought to vindicate the legal  
16 rights of [the class]”).<sup>1</sup>

17 As the Court has previously recognized, Plaintiffs’ need for information from unnamed  
18 class members is apparent: the information is highly relevant to Plaintiffs’ constitutional and  
19 statutory claims encompassing the delays in processing immigration benefit applications due to  
20 CARRP, whether notice was provided regarding the reasons for the relays, and the hardships  
21 experienced as a result of the delays in processing. *See, e.g.,* Dkt. 98 at 3 (holding that  
22 “information” pertaining to unnamed class members “is relevant” to Plaintiffs’ claims); Dkt. 183  
23 at 3 (permitting Plaintiffs’ counsel to obtain “information about particular unnamed class  
24 members to develop evidence for use in their case”). Yet, despite Plaintiffs’ reassurances that

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25 <sup>1</sup> Under the modified protective order, Plaintiffs’ counsel still could not advise potential  
26 class members whether their interests are represented in this lawsuit or whether they face a  
separate issue causing delay that requires a separate legal analysis.



1 counsel would not disclose whether a particular individual was ever, or is, subject to CARRP,  
2 Defendants do not agree that Plaintiffs' counsel may communicate with respondents to the  
3 Notice in a way that is consistent with the Court's protective order. The Court should therefore  
4 modify the protective order and permit Plaintiffs' counsel to follow-up with a handful of those  
5 who have responded to the Notice.

6 **A. Plaintiffs' communication proposal poses minimal risk to Defendants'**  
7 **purported security interests.**

8 The individuals who responded to the Notice *already suspect* that they have been subject  
9 to CARRP—they (or their counsel) reached out of their own volition, based on the Notice which  
10 complied with the Court's prior orders, because of their perception of how their immigration  
11 benefits applications have been processed. Communications from Plaintiffs' counsel, disclosing  
12 nothing about the CARRP status of any individual's application, will do nothing to alter these  
13 potential class members preexisting suspicions and thus poses little if any risk to Defendants'  
14 purported law enforcement and security concerns. The mere fact that Plaintiffs' counsel follow  
15 up with Notice respondents (and, in some instances, with their counsel) will not alert these  
16 individuals to anything that they have not already independently suspected.

17 Further, Plaintiffs' counsel will scrupulously adhere to the protective order and refuse to  
18 confirm or deny that any of these individuals are, or have ever been, subject to CARRP. The  
19 Notice itself made this clear and explicitly stated that Plaintiffs' counsel could not disclose  
20 whether anyone was a class member or provide any information about any specific application.  
21 Sepe Decl., Exhibit A. Moreover, Plaintiffs' proposed list of topics does not reveal any  
22 confidential information to the potential class members and reflects Plaintiffs' commitment to  
23 seeking relevant facts in accordance with the restrictions placed by the protective order. To the  
24 extent these individuals surmise that they are in fact subject to CARRP, they have already  
25 reached that conclusion—that is why they have affirmatively reached out to Plaintiffs' counsel.  
26

1 Defendants' speculation that Plaintiffs' counsel might disclose protected information is  
2 not only baseless but also insufficient to justify a blanket prohibition on communication with the  
3 potential class members. The Supreme Court has held that "the *mere possibility* of abuses does  
4 not justify routine adoption of a communications ban that interferes with...the prosecution of a  
5 class action in accordance with the Rules." *Gulf Oil*, 452 U.S. at 104. Plaintiffs should not be  
6 barred from seeking relevant information in accordance with the terms of the protective order  
7 simply because of Defendants' unsupported concern that doing so might pose a security risk,  
8 particularly where that risk is extinguished by individuals who already suspect they are subject to  
9 CARRP.

10 **B. Prohibiting communication with respondents to the Notice is highly**  
11 **prejudicial to Plaintiffs.**

12 Counsel's aim is to learn more about the individuals who responded to the Notice and  
13 develop evidence to support their claims. Presently, although Plaintiffs know that these  
14 individuals exist and the individuals already believe they have been subject to CARRP, counsel  
15 for Plaintiffs are unable to even hear about their experiences. Counsel are therefore unable to  
16 obtain the information and testimony that would otherwise be available to support Plaintiffs'  
17 claims. Their stories, despite going directly to the core of Plaintiffs' case, are off-limits. This  
18 severely prejudices Plaintiffs' ability to adequately represent unnamed class members and  
19 investigate their experiences.

20 The Court has reminded Defendants that the experiences of unnamed class members are  
21 relevant to Plaintiffs' claims, holding that Plaintiffs should be permitted to "obtain information  
22 about particular unnamed class members to develop evidence for use in their case." Dkt. 183 at  
23 3. Thus, Plaintiffs' counsel should be authorized to communicate with potential unnamed class  
24 members, some of whose experiences are material to this case and interests are impacted by the  
25 outcome of this litigation.

1 A blanket prohibition on communication with class members severely hinders Plaintiffs'  
2 ability to present their case with evidentiary richness. Barring counsel from following up with  
3 Notice respondents would make it “more difficult for [Plaintiffs], as the class representatives, to  
4 obtain information *about the merits of the case from the persons they [seek] to represent.*” *Gulf*  
5 *Oil*, 452 U.S. at 101 (emphasis added). In *Gulf Oil*, the Supreme Court ruled that it was  
6 “unquestionable” that an order prohibiting counsel from contacting potential class members  
7 “created at least potential difficulties for them as they sought to vindicate the legal rights” of the  
8 class. *Id.* Plaintiffs’ ability to effectively prosecute their claims are hamstrung by the existing  
9 order restricting communications with potential class members.

10 **C. Counsel for Plaintiffs’ need to conduct the limited interviews outweighs**  
11 **Defendants’ security concerns.**

12 Any order “limiting communications between parties and potential class members should  
13 be based on a clear record and specific findings that reflect a weighing of the need for a  
14 limitation and the potential interference with the rights of the parties.” *Gulf Oil*, 452 U.S. at 101.  
15 Here, a total prohibition on contact—as advocated by Defendants—is not justified by conjectural  
16 claims of a security risk. Plaintiffs’ counsel has committed to not disclosing to Notice  
17 respondents whether they are class members and whether their applications for immigration  
18 benefits are subject to CARRP. As these individuals already believe that they are subject to  
19 CARRP, Notice respondents are unlikely to treat follow-up communication regarding the basis  
20 for their response to the Notice as a confirmation of anything that they do not already assume.  
21 Defendants’ “speculative conjecture,” Dkt. 274 at 7, is outweighed by Plaintiffs’ concrete need  
22 for further information.

23 Weighing these considerations, the Court should construct a “carefully drawn order that  
24 limits speech as little as possible.” *Gulf Oil*, 452 U.S. at 102. The Court should permit Plaintiffs  
25 to contact the potential class members with the predetermined set of questions that conform to  
26 the existing limited protective order and that would not disclose CARRP status.

1 **V. CONCLUSION**

2 The prejudice the contact prohibition places on Plaintiffs' ability to present their case and  
3 adequately represent class members far outweighs the minimal risk of harm posed to  
4 Defendants' purported security interests, given the Respondents' suspicions they are subject to  
5 CARRP. The Court should accordingly grant this motion and permit Plaintiffs' counsel to  
6 interview some of the individuals who have responded to the Notice.

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**CERTIFICATE OF SERVICE**

I hereby certify that on the date indicated below, I caused service of the foregoing document via the CM/ECF system, which will automatically send notice of such filing to all counsel of record.

DATED this 9th day of January 2020, at Washington, D.C.

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